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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MICHAEL REGAN,

Plaintiff and Appellant,

v.

OFFICE OF ADMINISTRATIVE
HEARINGS OF THE STATE OF
CALIFORNIA et al.,

Defendants and Respondents;

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Real Party in Interest and Respondent.

B186078

(Los Angeles County
Super. Ct. No. BS093648)

APPEAL from a judgment of the Superior Court of Los Angeles County.

David P. Yaffe, Judge. Affirmed.

Michael Regan, in pro. per., for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Louis R. Mauro, Assistant Attorney General,
Catherine M. Van Aken and Jill Bowers, Deputy Attorneys General, for Defendants and
Respondents.

Kevin S. Reed, General Counsel, and Belinda D. Stitch, Staff Counsel, for Real
Party in Interest and Respondent.

INTRODUCTION

Plaintiff and appellant, Michael Regan (Regan), appeals a trial court judgment denying a petition for a writ of mandate. In the trial court, Regan sought an order directing defendants and respondents, the Office of Administrative Hearings (OAH) and administrative law judges, David Rosenman and Janis Rover (collectively respondents), to set aside an administrative decision pursuant to which respondents found that the Los Angeles Unified School District (LAUSD) had cause to dismiss Regan from employment. Regan claimed that the method of composing the three-member administrative panel which ruled on whether cause supported his termination violated his statutory rights under Education Code section 44944, subdivision (b).¹ Alternatively, Regan claimed that section 44944, subdivision (b), was unconstitutional as applied. Regan named the LAUSD as the real party in interest. The trial court denied the petition for a writ of mandate.

We affirm. Regan's designated member of the three-member administrative panel failed to appear at the first day of the hearing. Regan did not designate another member of the administrative panel. This constituted a failure to designate under section 44944, subdivision (b). The OAH was therefore statutorily authorized to request the Los Angeles County Office of Education to make a designation on Regan's behalf. Thus, the method for composing the three-member administrative adjudicatory panel did not violate Regan's statutory rights under section 44944, subdivision (b).

In addition, we conclude that section 44944, subdivision (b), is not unconstitutional as applied in this case. The statute did not impose an unfair burden or any costs upon Regan in exercising his rights to participate in the selection of one member of the three-member administrative panel. Finally, no miscarriage of justice resulted from the trial court order directing Regan to seek writ relief pursuant to Code of Civil Procedure section 1085, as opposed to Code of Civil Procedure section 1094.5.

¹ Unless otherwise indicated, all unspecified statutory references are to the California Education Code.

STATUTORY FRAMEWORK

Regan contends that respondents violated his statutory rights under section 44944, subdivision (b), by the manner in which the OAH composed the administrative panel. Regan also makes an “as applied” challenge to the constitutionality of section 44944, subdivision (b). We therefore begin by setting forth the statutory framework of section 44944, subdivision (b).

Regan was a certificated teacher with the LAUSD. The Education Code sets forth the grounds for dismissal of a certificated employee. (See § 44932.) Upon receiving notice of an intention to dismiss, an employee may demand a hearing. (See §§ 44937 & 44941.) Section 44944, subdivision (a), requires that a hearing be held within 60 days from the date of the employee’s demand.

Section 44944, subdivision (b), governs the composition of a “Commission on Professional Competence” (COPC), which is the administrative panel statutorily empowered to conduct a hearing on the propriety of a certificated employee’s dismissal charges. The statute provides in pertinent part: “The hearing provided for in this section shall be conducted by a Commission on Professional Competence. *One member of the commission shall be selected by the employee*, one member shall be selected by the governing board, and one member shall be an administrative law judge of the Office of Administrative Hearings who shall be chairperson and a voting member of the commission and shall be responsible for assuring that the legal rights of the parties are protected at the hearing. *If either the governing board or the employee for any reason fails to select a commission member at least seven calendar days prior to the date of the hearing, the failure shall constitute a waiver of the right to selection, and the county board of education or its specific designee shall immediately make the selection.*” (Italics added.)

In addition, pursuant to subdivisions (d) and (e) of section 44944, the costs of a teacher’s designated panel COPC member are to be borne by the state. Subdivision (d) provides: “(1) If the member selected by the governing board or the member selected by the employee is employed by any school district in this state the member shall, during

any service on a Commission on Professional Competence, continue to receive salary, fringe benefits, accumulated sick leave, and other leaves and benefits from the district in which the member is employed, but shall receive no additional compensation or honorariums for service on the commission. [¶] (2) If service on a Commission on Professional Competence occurs during summer recess or vacation periods, the member shall receive compensation proportionate to that received during the current or immediately preceding contract period from the member's employing district, whichever amount is greater."

Subdivision (e) of section 44944 provides in pertinent part: "The state shall pay any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, and the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee."²

FACTUAL AND PROCEDURAL BACKGROUND

1. Administrative Proceedings

On November 26, 2002, the LAUSD sent Regan a notice stating that the Board of Education of the City of Los Angeles concluded that there existed cause to dismiss him from employment. In the letter, LAUSD advised Regan of his right to a hearing. On December 17, 2002, Regan requested a hearing.

² In *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, the California Supreme Court held that section 44944, subdivision (e), was unconstitutional on its face because it required the employee to pay for one-half of the cost of the administrative law judge. However, the Supreme Court did not invalidate the subdivision (e) provisions, quoted above, requiring the state to pay for the costs of an employee-designated COPC member. (20 Cal.4th at p. 350, fn. 10.)

In February 2003, Regan consented to a continuance of the administrative hearing until late June and early July 2003, which was beyond 60 days from the date of his demand for a hearing.

On April 3, 2003, the LAUSD placed Regan on an unpaid leave status.

On June 5, 2003, the LAUSD requested a second continuance to September 2003 because of witness unavailability. Regan filed an objection on the ground that because the LAUSD had placed him on unpaid leave, any continuance would be severely prejudicial to Regan. In its reply, the LAUSD explained that following initiation of the dismissal action, Regan had not been placed on unpaid leave, but that he was not being paid for time when he was absent without leave (AWOL). The LAUSD explained that after initiation of the dismissal action, the LAUSD assigned Regan to the Local District Office. Because Regan failed to report to work or provide medical documentation for his absences, Regan was considered AWOL. The OAH granted the continuance to August 2003.

On August 13, 2003, Regan filed a document with the OAH designating a panel member to the COPC. The following day, August 14, 2003, Regan's attorney of record filed a notice of withdrawal.

On August 15, 2003, the LAUSD filed with the OAH a request for a continuance on Regan's behalf. Counsel for the LAUSD explained that upon receiving the notice of withdrawal from Regan's attorney, she contacted Regan to ascertain his plans. Regan stated that he needed a continuance to obtain a new attorney. The OAH continued the hearing to May 2004.

On March 15, 2004, the OAH served Regan with a prehearing conference order. There, the OAH notified Regan that he was required to file and serve his designation of a member for the COPC by May 3, 2004.

The record indicates that Regan did not file and serve a designation of a member to serve on the COPC in response to the March 15, 2004 order.

In his declaration filed in support of his verified petition for a writ of mandamus, Regan states that on May 15, 2004, his previously designated COPC panel member

advised him that the California Teachers' Association ordered her to withdraw from the COPC because Regan was no longer a member of United Teachers Los Angeles. There is no evidence in the record that Regan attempted to appoint a substitute COPC panel member on his behalf.

On May 17, 2004, the first day of the hearing on Regan's dismissal, Regan's panel member did not appear. In a letter to the Los Angeles County Office of Education, which was copied to Regan, the OAH stated that Regan's panel member refused to participate as a member of the COPC. The OAH requested that the Board of Education designate a COPC member on Regan's behalf so that the hearing on the dismissal could proceed.

On May 19, 2004, Regan demanded that the OAH withdraw from the matter and transfer the action to a court of competent jurisdiction. Regan's demand was based upon the OAH request to the Los Angeles County Office of Education to appoint a COPC member on Regan's behalf.³ The OAH denied Regan's motion.

On June 8, 2004, the Board of Education designated a panel member on behalf of Regan. On June 16, 2004, as to this designation, Regan wrote to the OAH stating that, although he was cooperating with the OAH hearing, he was not waiving any of his rights. Regan did not raise any specific objections to the designation of a panel member on his behalf.

The COPC conducted a hearing from June 21 to June 24, 2004. The COPC received oral and documentary evidence. On September 24, 2004, the OAH served Regan with a copy of the COPC written decision. There, the COPC found that the LAUSD had cause to dismiss Regan. The COPC, however, concluded that cause did not exist to dismiss Regan on all grounds asserted by the LAUSD.

³ Regan wrote: "In adherence to OAH procedure[,] I timely named a panel member of my choice to participate in these proceedings. I have informed the OAH that I have not and do not waive my right to select a panel member and that the OAH has fatally prejudiced these proceedings by issuing an order that interfered with my membership of my professional organization, thus rendering me unable to be represented in these proceedings by a panel member of my selection."

On October 6, 2004, the LAUSD advised Regan in writing that he was dismissed as a certificated employee.

2. *Regan Files Petition for Writ of Mandate in Superior Court*

On November 22, 2004, in propria persona, Regan filed a verified petition for writ of mandamus pursuant to Code of Civil Procedure section 1094.5.

In his petition, Regan alleged that respondents denied him procedural due process and a fair hearing. Specifically, Regan claimed that he had properly selected a COPC panel member, and his rights were violated when the LAUSD was permitted to select the COPC panel member on his behalf.

On March 14, 2005, the trial court held a hearing on Regan's petition. During the hearing, Regan expressly advised the trial court that the writ relief he was seeking was based upon the alleged denial of procedural due process. Regan explained that he was not contesting the COPC decision on the merits. The record indicates that Regan filed a second superior court action contesting the COPC decision on the merits. Regan filed a separate appeal from the subsequent trial court judgment in that proceeding.

The trial court concluded that Regan could not proceed pursuant to Code of Civil Procedure section 1094.5.⁴ In addition, the trial court noted that Regan had not filed any portion of the administrative record. The trial court ruled that Regan's remedy, if any, would be pursuant to Code of Civil Procedure section 1085. The trial court then set a schedule for the parties to brief and submit evidence on the issue of whether Regan was

⁴ In its minute order, the trial court ruled: "Although the petition purports to be for administrative mandate pursuant to section 1094.5 of the Code of Civil Procedure, [Regan] concedes that the writ that he seeks is not for the purpose of inquiring into the validity of a final administrative decision made as the result of a proceeding in which by law a hearing is required to be given, and [Regan] insists that it is not necessary for the court to review an administrative record in order to decide whether [Regan] is entitled to the relief that he seeks [¶] Therefore [Regan] does not have a claim under section 1094.5 of the Code of Civil Procedure. [Regan's] remedy, if any, is by way of ordinary mandate (Code of Civil Procedure section 1085) to compel respondent to reinstate [Regan] because it did not provide [Regan] with a hearing to which he is entitled within the time provided by law."

entitled to relief pursuant to Code of Civil Procedure section 1085. The court set a hearing date for June 2005.

3. *The Trial Court Judgment*

On June 28, 2005, the trial court conducted a hearing on Regan's request for writ relief pursuant to Code of Civil Procedure section 1085. The trial court denied the petition.⁵ The trial court entered judgment in favor of respondents. Regan timely filed a notice of appeal.

CONTENTIONS

Regan contends that: (1) respondents violated his statutory rights under section 44944, subdivision (b); (2) alternatively, section 44944, subdivision (b), is unconstitutional "as applied" in this case; and (3) the trial court erred by denying Regan a hearing pursuant to Code of Civil Procedure section 1094.5.

STANDARD OF REVIEW

The superior court must independently review the administrative record in mandamus challenges to employee disciplinary proceedings, which result in termination. (*Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 500.) In addition, "as to administrative determinations properly reviewed in the superior court . . . , the scope of review is the same in the appellate court as it was in the superior court, that is, the appellate court reviews the administrative determination, not that of the superior court, by the same standard as was appropriate in the superior court." (*Id.* at p. 501.)

⁵ In its minute order, the trial court found: "[Regan] apparently contends that when his selected panel member failed or refused to appear at the hearing, he was relieved of any further duty to exhaust his administrative remedy. There is no evidence before the court that [Regan] requested, offered, or agreed to appoint a substitute for the panel member who failed to appear. [¶] [Regan's] contentions are clearly without merit. He obviously could not avoid his duty to exhaust his administrative remedy by appointing a panel member who refused to appear and act as such. The appointment of a substitute panel member is provided for in section 44944(b) and the appointment of such a substitute by the County Board of Education did not violate [Regan's] rights under the statute."

“We apply a de novo standard of review where, as here, our task consists of applying a statute to underlying facts that are not in dispute.” (*Shapiro v. Board of Directors* (2005) 134 Cal.App.4th 170, 178.) The parties did not brief the issue of the appropriate standard of review as to the issue of whether section 44944, subdivision (b), is unconstitutional as applied in this case. We have no occasion to resolve this issue because under any standard of review, de novo or deferential, we conclude that section 44944, subdivision (b), is not unconstitutional as applied in this case.

DISCUSSION

1. *Regan’s Statutory Rights Were Not Violated*

Applying the rules of statutory construction,⁶ we conclude that respondents did not violate Regan’s statutory right to select a COPC member pursuant to section 44944, subdivision (b).

According to section 44944, subdivision (b), the employee (Regan), the governing board (the LAUSD), and the OAH are each entitled to select a member of the COPC. In this case, Regan made his designation of a COPC member in August 2003.

However, section 44944, subdivision (b) also provides: “If either the governing board or the employee *for any reason* fails to select a commission member at least seven calendar days prior to the date of the hearing, the failure shall constitute a waiver of the

⁶ When construing a statute, we begin with the words of the statute. In *California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, the court explained: “ ‘The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To determine intent, courts turn first to the words themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. [Citation.] . . . Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences.’ ” (*Id.* at p. 1131.)

right to selection, and the county board of education or its specific designee shall immediately make the selection.” (Italics added.)

In drafting the foregoing quoted portion of section 44944, subdivision (b), the Legislature used the language “for any reason.” Interpreting these words pursuant to their ordinary and generally accepted meaning (*California Emergency Physicians Medical Group v. PacifiCare of California, supra*, 111 Cal.App.4th at p. 1131), we must conclude that the Legislature intended this language to have a broad application.

In this case, Regan’s designated COPC member failed to appear at the hearing and Regan failed to appoint a substitute COPC member. In addition, there is no evidence that Regan requested a continuance in order to select and appoint a substitute COPC member. Such a situation must be deemed a failure to select “for any reason.” (§ 44944, subd.(b).)

Regan suggests that he could not exercise his right to designate a COPC substitute member because he had been placed on unpaid status, was no longer a member of his professional association, and did not have the necessary funds to pay a substitute member. We reject his assertion.

Section 44944, subdivision (b), did not, and does not, impose any monetary charges upon an employee like Regan in relation to a designated COPC member. In addition, subdivisions (d) and (e), quoted above, indicate that an employee like Regan is not required to pay any costs in relation to an employee designated COPC panel member and that such costs shall be borne by the state.

In conclusion, on May 17, 2004, Regan’s designated COPC member did not appear and Regan did not seek to appoint a substitute. This must be deemed a failure to select. Thus, section 44944, subdivision (b), statutorily authorized the OAH to request the Board of Education to designate a COPC member on Regan’s behalf. The trial court therefore did not err by concluding that Regan’s rights under section 44944, subdivision (b), were not violated.

2. *Section 44944, Subdivision (b), Is Not Unconstitutional*

Relying upon the case of *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, Regan claims that section 44944, subdivision (b), as applied, violated his constitutional right to due process. We disagree.

Regan asserts that by the time of the administrative hearing in May and June 2004, he was indigent, no longer a member of the California Teachers Association, and could not afford to pay for a COPC panel member. On this basis, Regan asserts that section 44944, subdivision (b), therefore imposed an unequal risk on him (as opposed to the LAUSD), because he became indigent during the pendency of the administrative proceedings and could not designate a COPC panel member.

Regan suggests that respondents violated Regan's constitutional right to due process because the administrative hearing was conducted without a COPC panel member appointed by Regan. Due process, however, only requires that the state provide Regan with a meaningful pre-termination hearing. (*Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532.) Regan had the right to designate a COPC member. He has presented no evidence that he attempted to designate a substitute COPC member after his first designee declined. There was no violation of due process.

Regan further asserts that section 44944, subdivision (b), imposed an unequal risk upon him. Specifically, Regan asserts that subdivision (b), permits a teacher to lose the right to designate a COPC member, but that such a risk will not be borne by the LAUSD. We reject this argument.

As explained above, section 44944, subdivision (b), did not, and does not, impose any monetary charges against an employee like Regan in selecting a COPC panel member. (See § 44944, subds. (d) & (e).)

Regan also appears to suggest that section 44944, subdivision (b), allows a governmental entity like the LAUSD to delay the proceedings in order to create a situation in which the employee becomes indigent and no longer able to designate a COPC member. Regan seems to assert that the LAUSD can then stack the deck in its favor on the three-member COPC panel. We reject this assertion.

Upon an employee's failure to designate a COPC member, section 44944, subdivision (b), requires that the alternate designation is to be made by the county board of education, not the LAUSD. In addition, subdivision (b), provides that the members selected by the governing board and the employee "shall not be employees of the district initiating the dismissal."

Thus, on this record, we cannot conclude that section 44944, subdivision (b), imposed an unequal burden on Regan versus the burden placed upon the LAUSD.

Finally, the case of *California Teachers Assn. v. State of California*, *supra*, 20 Cal.4th 327 is inapposite to the issues presented in this appeal. As noted above, section 44944, subdivision (e), contained a provision that in the event the COPC determined that a teacher should be dismissed, the teacher was required to pay half the costs of the administrative law judge. The court found that this provision impermissibly chilled a teacher's right to a meaningful hearing. (20 Cal.4th at pp. 356-357.) As explained above, subdivision (b) of section 44944 places no such chilling economic costs upon teachers. Thus, it is not constitutionally infirm under the rationale of *California Teachers Assn. v. State of California*, *supra*, 20 Cal.4th 327.

3. *Reversible Error Did Not Result from the Trial Court Ordering Regan to Proceed by Way of Code of Civil Procedure Section 1085*

Regan claims that the trial court order requiring him to proceed by way of Code of Civil Procedure section 1085, as opposed to Code of Civil Procedure section 1094.5 constituted an abuse of discretion, which requires reversal of the trial court judgment. We reject this argument.

The trial court did not err by requiring Regan to proceed by way of section 1085. It is undisputed that section 1094.5, subdivision (a), required Regan to file all or part of the administrative record in the superior court action. Regan did not. In addition, Regan was asserting only procedural error, and not seeking review of the administrative decision on the merits.

In any event, Regan received a full evidentiary hearing on his petition for writ relief. He was permitted to submit evidence and make argument to the trial court. To

remand this action for a second writ hearing pursuant to Code of Civil Procedure section 1094.5 would result in a waste of the court's and the parties' resources. (See Civ. Code, § 3532 ["The law neither does nor requires idle acts."].) In this regard, pursuant to our standard of review, we review the administrative decision and record, not the judgment or the reasoning of the superior court. (*Schmitt v. City of Rialto*, *supra*, 164 Cal.App.3d at p. 501.)

In conclusion, the trial court did not err and Regan has failed to show a miscarriage of justice requiring reversal. (See Cal. Const., art. VI, § 13 ["No judgment shall be set aside . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."].)

DISPOSITION

The judgment is affirmed. Respondents and real party in interest are to recover costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.